No. 82-1769

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LAKEWOOD, OHIO CONGREGATION
OF JEHOVAH'S WITNESSES, INC.,
Petitioner,

v.

CITY OF LAKEWOOD, OHIO,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

The case before this Court frames a constitutional question of monumental importance. In its attempt to dissuade this Court from granting the writ of certiorari, the City argues that the factual setting of this case is "so unique" as to prevent a decision of this Court on the merits from having any genuine precedential value; that the decision below is supported by "long established law" as announced by this Court; and that no substantial federal question is presented. However, the record before this Court proves otherwise.

A. The Issue In This Case Is The Extent To Which A City May, By Ordinance, Prohibit The Use of Property For Public Worship.

The City inaccurately characterizes this case as concerning nothing more than a minor dispute resulting from a landowner's attempt to build a too-large structure on a too-small piece of real estate and to intrude thereby upon the privacy of adjoining landowners. The very nature of the ordinance which the City seeks to defend prevents it from being so classified. This is because the City's ordinance does not *regulate* the religious use of buildings to be located in residential areas: it *prohibits* such use. Given this prohibition, neither the size of this particular lot, the distance of the proposed church from adjoining properties, nor any other fact relating to this particular parcel of property has any relevance at all. No matter what the facts are relating to the Congregation's real property, they cannot make any difference; the City's ordinance, prohibiting it as it does any use of any property located in a single-family residential district for a church under any circumstances, squarely raises the issue of the extent

to which cities may constitutionally enforce such zoning ordinances.

The issue raised herein is confronted on a daily basis by zoning authorities in cities, towns and villages in every state in this nation, each of which is required to interpret for itself the reach of the First Amendment. While the great majority of state courts which have decided this issue have concluded that local zoning authorities may not prohibit churches in residential districts, it is apparent that state supreme courts have varying views with respect to the First Amendment issue. Given the state of the law, there have been hundreds of cases[1] in which this issue has been litigated and it is impossible to claim, as the City does, that a decision by this Court herein would have no precedential value.

The practical effect of a decision by this Court would be far reaching, for it would essentially eliminate the duplicative litigation on this issue presently pending in state courts throughout this country.[2] Moreover, the determination by this Court of this critical First Amendment issue would significantly reduce the delays experienced by religious congregations which must en-

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[1] *See, inter alia,* Curry, James E., *Public Regulation of the Use of Land* (1964) (listing 248 cases to date of publication); and cases collected in Anderson, Robert M., *American Law of Zoning* 2d (2d Ed. 1976) § 12.18 *et. seq.; Annot.,* 74 ALR 2d 377 (1960); Rathkopf, Arden H., *The Law of Zoning and Planning,* Vol. II (4th Ed. 1981) § 20.01 *et. seq.;* and Rohan, Patrick J., *Zoning and Land Use Controls* (1978 and Supp. 1981), § 305[4][a] et. seq.

[2] In the absence of a definitive standard of review from this Court, such litigation has resulted in inconsistent and even contradictory results from state to state. *Compare American Friends of the Society of St. Pius Inc. v. Schwab,* 68 A.D. 2d 646 (N.Y. App. 1979) and *Matter of Islamic Society of Westchester and Rockland Inc.,* N.Y.L.J., 7-18-83, p. 17, col. 6, —— A.D. 2d ——, —— N.Y.S. 2d —— (1983) with *State v. Cameron,* 184 N.J. Super. 66, 445 A.2d 75 (N.J. Super. Ct. App. Div. 1982).

gage in lengthy and expensive battles to secure their First Amendment rights. Such delay is, unfortunately, typical.[3] *See, e. g., Int'l Society of Krishna Consciousness, Inc. v. City of Evanston, Illinois,* 368 N.E. 2d 644, at 653 (Ill. App. 1977). ("Although plaintiff has tried to secure a permit for five years, the record before us reflects a case still in its earliest stages.")

Contrary to the contention of the Respondent, the

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[3] The Congregation first sought a building permit for its church in 1972, eleven years ago, pursuant to a provision for a "special exception" contained within an ordinance since repealed. That permit was denied on the grounds that a temporary traffic hazard existed. The Congregation unsuccessfully appealed this initial refusal to the state trial court and court of appeals, the latter of which stated:

> It is recognized that an ordinance which would prohibit the construction of churches in single family residential districts would be unconstitutional. *Israel Organization v. Dworkin* (1976), 105 Ohio App. 89. . . .

Lakewood Congreg. of Jehovah's Witnesses v. City of Lakewood, Ohio, Case No. 32386 (8th Dist. Ct. Apps., 1974).

Before the abatement of this traffic hazard, the City enacted the present ordinance. [Respondent's Brief erroneously states that the present Lakewood zoning ordinance was adopted in 1983. Resp. Brief at 7. The ordinance was enacted in 1973]. Thereafter, when the Congregation again applied for a building permit, the City told the Congregation that not only was its property no longer usable for a church by reason of the new ordinance, but that the City's prior denial—albeit made at a time when a temporary traffic hazard existed—was still binding.

The Congregation appealed the City's final determination in 1975. On two occasions, the trial court dismissed the complaint; each time, the Congregation appealed, and in each instance the appellate court reversed and remanded the matter. The last such remand occurred on May 17, 1979, at which time the trial court was instructed to determine the case on its merits. Almost one and one-half years later, the state trial court had still not taken any further action, and it was at that juncture that the Congregation filed this case in the United States District Court for the Northern District of Ohio.

only unique aspect of this case is the extent to which Lakewood has restricted the free exercise of religion by prohibiting religious uses in almost 90% of its area.[1] Although other cities have restricted churches from some areas of their territory or required special use permits as a prerequisite to construction of a church, seldom has a municipality enacted an ordinance so broad in its effect that it all but excludes religious uses from a city. The Sixth Circuit's decision is an invitation to other municipalities to follow Lakewood's lead in substantially or completely prohibiting religious uses within their boundaries. Whether such prohibition can be reconciled with the right to the free exercise of religion guaranteed by the First Amendment presents a federal constitutional question worthy of review by this Court.

B. This Case Presents A Substantial Federal Question Which Has Not Been Decided In Accordance With The Correct Constitutional Standards.

The City further asserts that the Court of Appeals correctly applied "well established constitutional standards," and that, therefore, "there is no substantial federal question presented." That this case presents a substantial federal question cannot reasonably be denied, although the City nonetheless so denies. To that end, the City argues that this Court's summary dismissal, over thirty years ago, of the appeal taken in *Corporation of Presiding Bishop v. Porterville,* 90 Cal. App. 2d 656, 203 P.2d 823 (1949), *app. dism'd.,* 338 U.S. 805, *reh'g den.,* 338 U.S. 939 (1950), mandates that conclu-

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[1] While the City is unwilling to accept Petitioner's characterization that churches are excluded from almost 90% of the City, the Sixth Circuit apparently was satisfied that such was the fact. 599 F.2d at 305 (Pet. App. 4a.)

sion. *See* Resp. Brief, at 14, 17 and 21. This conclusion can only result from Respondent's misapprehension of this Court's present view of the precedential effect of summary dispositions.

In *Hicks v. Miranda,* 422 U.S. 332 (1975), this Court held that lower courts are indeed bound by its summary actions on the merits, but recognized that "ascertaining the reach and content of summary actions may itself present issues of real substance," *id.*, 422 U.S. 345, n.14, and that doctrinal developments occurring since the date of the summary disposition may well militate in favor of the opposite result.

In the eight years since *Hicks v. Miranda,* this Court has consistently taken the position that "summary dispositions . . . extend only to the 'precise issues presented and necessarily decided by those actions,'" *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 496 (1981), quoting *Mandel v. Bradley,* 432 U.S. 173, 176 (1977), and that "[t]he precedential significance of the summary action . . . is to be assessed in the light of all of the facts in the case." *Id.,* 432 U.S. at 177. This Court has thus emphasized that "[a] summary disposition affirms only the judgment of the court below . . . and no more may be read into [the Supreme Court's action] than was necessary to sustain that judgment." *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83 (1979).

Corporation of Presiding Bishop was decided, in part, on a very narrow ground: the plaintiff was not a religious congregation but a "corporation sole, the existence of which depends upon the law of the State," and therefore, its enjoyment of property rights was "subject to reasonable regulations," *id.,* 203 P.2d at 825. Thus, there is a significant factual disparity between *Corporation of Presiding Bishop* and the instant case, and it is not at all clear that this Court's summary disposition of *Corporation of Presiding Bishop*

over thirty years ago can or should control.[5] More importantly, major doctrinal developments have occurred in the interim, not the least of which is the development of the "strict scrutiny test," *see, inter alia, Sherbert v. Verner,* 374 U.S. 398 (1963); *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *McDaniel v. Paty,* 435 U.S. 618 (1978), and *Thomas v. Review Board of Indiana Employment Security Div.,* 450 U.S. 707 (1981). The development of the law of "strict scrutiny" and this Court's consistent application of it to First Amendment cases must constitute a significant enough doctrinal development to foreclose the according of any further precedential value to its summary disposition of *Corporation of Presiding Bishop.*

Respondent's misunderstanding as to the continuing efficacy of *Corporation of Presiding Bishop* extends also to *State v. Cameron,* 184 N.J. Super. 66, 445 A.2d 75 (N.J. Super. Ct. App. Div. 1982). Contrary to Respondent's claims, *see* Resp. Brief, at 17, the *Cameron* court, after first tracing the development of the law of summary disposition since *Hicks v. Miranda,* acknowledged that *Corporation of Presiding Bishop* is *no longer controlling,* by reason of interim legal and doctrinal changes, and that commentators agree that the majority of states hold the exclusion of churches from residential zones to be impermissible, *id.,* 184 N.J. Super. at 80.

Of course, the most compelling reason for concluding that *Corporation of Presiding Bishop* has no continuing efficacy is that the great weight of American law is to the contrary, *see* Pet. Brief, at 9, nn.7 and 8. State courts have considered themselves free to reach their own conclusions as to the impact of the First Amend-

[5] Neither the trial court nor the Sixth Circuit herein appears to have even considered the possibility that *Corporation of Presiding Bishop* controlled, as neither lower court as much as cites to the earlier case.

ment on the right of local authorities to regulate the religious use of land. Those courts have generally concluded that churches may not be excluded from residential areas, either on the basis that such an exclusion could not bear a substantial relation to the general welfare and thus would run afoul of the *Euclid* test,[6] or on the basis that such an exclusion would abridge the First Amendment guarantee of free exercise.[7] But whether state courts have resolved the issue correctly is not nearly as important as the fact that the meaning of the First Amendment is a *federal* constitutional question, properly determined by this Court, which is the final arbiter of such questions.

Until the decisions of the courts below in this case, there was still no *federal* case determining this issue. Consequently, the decision of the Sixth Circuit Court of Appeals is presently viewed as *the* definitive articulation of the state of the law of the First Amendment's Free Exercise Clause,[8] and will continue to be so viewed until this Court determines the law.

The Congregation believes that the Sixth Circuit's decision is erroneous, and that its illegal inquiry into, and weighing of religious beliefs of the Congregation, coupled with its refusal to apply the strict scrutiny test, contravene the First Amendment decisions of this Court. This Court has already held that where a zoning ordinance invades or burdens a First Amendment right, that ordinance must be subjected to the strict scrutiny test. In *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61,

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[6] *See, e. g., State ex rel Synod of Ohio of United Lutheran Church in America v. Joseph,* 139 Ohio St. 229, 39 N.E. 2d 515 (1942).

[7] *See, e. g., Jewish Reconstructionist Synagogue v. Incorporated Village of Roslyn Harbor,* 38 NY 2d 283, 342 N.E. 2d 535 (1975) *cert. den.,* 426 U.S. 950 (1976).

[8] *See, e. g., Zoning and Planning Law Report,* Vol. 6, No. 5 (May, 1983) (identifying the decision of the Sixth Circuit Court of Appeals as "a case of first impression in the federal courts").

at 68 (1981), this Court stated: "When a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial governmental interest [footnote omitted]." *See also, Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 62 (1976).

This Court has already applied the strict scrutiny test to zoning ordinances defining a "family," *Moore v. City of East Cleveland,* 431 U.S. 494 (1977); excluding live entertainment in the form of nude dancing, *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 (1981); dispersing adult movie theatres, *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); and excluding billboards, *Metromedia Inc. v. City of San Diego,* 453 U.S. 490 (1981). The application of the strict scrutiny test to zoning ordinances excluding places of public worship from some or all of a municipality is equally mandated by the First Amendment.

The "substantial relation" test of *Euclid* is an insufficient safeguard against the exercise by local zoning authorities of nearly unbridled discretion to prohibit the religious use of land. Prejudices against particular religious groups, or all religious groups in general, can readily be veiled in the guise of concern for noise, open space, traffic and the like, any of which can be seized upon as a ground for exclusion. That this is a real danger has already been recognized by other courts. In *Matter of American Friends of the Society of St. Pius, Inc. v. Schwab, et al,* 68 A.D. 2d 646, 649 (N.Y. App. Div. 2d Dep't 1979), the court said:

> It is noteworthy that, in speaking of the "constitutional prohibition against the abridgement of the free exercise of religion," the court recognized and paid deference to "the public benefit and welfare which is itself an attribute of religious worship in a community." *Human experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential*

> *neighborhood, tend to avoid any appearance of an antireligious stance* and temper their decision by carefully couching their grounds for refusal to permit such use in terms of traffic dangers, fire hazards and noise and disturbance, rather than on such crasser grounds as lessening of property values or loss of open space or entry of strangers into the neighborhood or undue crowding of the area.

(Emphasis supplied.)

The court's conclusion in *Schwab* is apt and equally applicable in this case: the zoning power of municipalities is easily susceptible to being abused for the purpose of denying the constitutional right to the free exercise of religion. Requiring that the zoning authority demonstrate a compelling need to employ its power in these situations would greatly minimize the potential for such abuse.

Respondent finally suggests that this Court's granting of the writ of certiorari would not be consonant with the standards set out in this Court's own rules. However, the standards established in Sup. Ct. Rule 17[9] certainly favor the granting of a writ of certiorari herein. Rule 17.1 provides, *inter alia,* that the following are proper circumstances for the granting of such a writ:

> (a) When a federal court of appeals . . . has decided a federal question in a way in conflict with a state court of last resort;
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> * * *
>
> (c) When . . . a federal court of appeals has decided an important question of federal law which

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[9] Respondent incorrectly cites the applicable rule as being Rule 19, *see* Resp. Brief, at 20, which is, no doubt, a reference to *former* Rule 19 which, when substantially revised, was redesignated as Rule 17.

> has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. . . .

The decision of the Sixth Circuit is in conflict with the decisions of no less than six state supreme courts, *see* Pet. Brief at 9-10, n.7. Furthermore, as the appellate court herein itself acknowledged, *see* 699 F.2d at 304 (Pet. App. 2a.), this case is one of first impression in the federal courts, and by reason thereof, meets the standard set forth in Sup. Ct. Rule 17.1(c). In fact, it is difficult to imagine a case for which review on certiorari would be more appropriate or necessary. Thus, for all the reasons set forth herein and in its Petition For Writ of Certiorari, the Petitioner urges this Court to grant the writ and review the case at bar.

Respectfully submitted,

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